IN THE UNITED STATES OF BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Mirant Corporation, et al.,	§	
	§	Case No. 03-46590
	§	Jointly Administered
Debtors.	§	Chapter 11

Memorandum Order

Before the court is the Potomac Electric Power Company's Emergency Motion for Temporary Restraining Order and Preliminary Injunction Prohibiting Mirant from Suspending Payments under the Back-to-Back Agreement (the "Motion") by which Pepco[1] asks that the court restrain Debtors from not paying amounts due to Pepco pursuant to the Back-to-Back Agreement, which has been held by the District Court to be an integral part of the APSA and so not independently rejectable pursuant to section 365 of Bankruptcy Code[2] (the "Code"). The Motion was filed in the District Court which referred it to this court for expedited consideration (see District Court order of December 10, 2004**)**. This court considered the Motion on December 15, at which time Pepco offered the testimony of Joseph Rigby ("Rigby"), Chief Financial Officer of Pepco. Following Rigby's testimony, Pepco having indicated it would offer no further evidence and that it had no objection to the court's consideration of certain exhibits appended to Debtor's pleadings, the court, on Debtor's oral motion, denied the Motion. Though the court at that time explained its decision on the record, the parties in interest and

[1] The court in this Memorandum Order adopts those abbreviated terms familiar to interested parties from prior court decisions. *See, e.g., In re* Mirant Corp., 378 F.3d 511 (5th Cir. 2004) and bankruptcy and district court decisions at 299 B.R. 152 and 303 B.R. 304.

[2] 11 U.S.C. § 101 *et seq.*

other courts considering the Motion or related proceedings would be benefited by clarification and explanation of the remarks made on the record.

To begin with, the District Court expressed concern that the Motion was not pursued as an adversary proceeding (see FED. R. BANKR. P. 7001(6)). Pepco however, filed an adversary proceeding paralleling the Motion between the District Court's order of reference and the December 15 hearing. The court further concludes Debtors have been afforded due process equivalent to what they would have been entitled to had the relief sought by the Motion been initially prayed for in a complaint. *See* COLLIER ON BANKRUPTCY ¶ 9014.01 (15th ed. rev. 2002). Finally, it would exalt form over substance and potentially prejudice Pepco to require that time be expended in correction of an immaterial procedural defect; rather, the court best serves its function and the advancement of these chapter 11 cases by prompt attention to the merits of the Motion.

The District Court also expressed concern about jurisdiction to grant the relief sought in the Motion. While federal jurisdiction over the issue presented would be doubtful absent the pendency of Debtors' chapter 11 cases, the court concludes jurisdiction is present to grant Pepco relief. Jurisdiction over Debtors' cases is provided by 28 U.S.C. § 1334(a). This court has authority by reason of Debtors' chapter 11 filings to limit or direct aspects of the conduct of Debtors' business. Code §§ 363(c)(2), 1107(a) and 1108 (each authorizing the court to vary for cause a debtor's conduct of business and use of its assets). In the Motion, Pepco has essentially asked that the court direct Debtors to comply with – as opposed to breaching – the Back-to-Back Agreement. The court considers such relief within its power to oversee and, if necessary, mandate change to Debtors' conduct of its business.

The Back-to-Back Agreement, which Pepco asks this court to force Debtors to perform requires Debtors to pay to Pepco the difference between the prices paid by Pepco for power under certain long term contracts and the market price of power.[3] Thus, by the Motion Pepco asks that this court enter an injunction requiring payment of money to it by Debtors. Debtors precipitated the Motion by giving notice of their intent to stop paying Pepco as required by the Back-to-Back Agreement. Since the District Court has held that Debtors may not reject the Back-to-Back Agreement other than by rejecting the entire APSA (*see In re Mirant Corp.,* No. 4-03-CV-1242-A, Slip Op., p. 6 (N.D. Tex., Dec 9, 2004)), Pepco argues Debtors must perform the Back-to-Back Agreement.

This, however, is not accurate. Debtors may eliminate their duty to perform the Back-to-Back Agreement by successfully rejecting the APSA. As the District Court recognized, Debtors are likely to appeal its decision that the Back-to-Back Agreement was indivisible from the APSA (*see In re Mirant Corp.* Slip Op., p. 10). Should the District Court's decision be reversed, the Back-to-Back Agreement might yet be rejected independently of the APSA. Nor does the District Court's decision that the Back-to-Back Agreement may not be rejected alone amount to that agreement's assumption. Both Code § 365(a) (providing general authority to assume or reject contracts) and Code § 1123(b)(2) (providing for assumption or rejection of contracts in a plan) are permissive: the Code does not *require* that a contract be assumed or rejected. If a contract is neither assumed nor rejected, it flows through a chapter 11 case and remains an obligation of the chapter 11 debtor, though not necessarily of its successors. *See Century Indemnity Co. v. National Gypsum Company Settlement Trust (In re National Gypsum*

[3] The genesis and terms of the Back-to-Back Agreement are reviewed in *In re* Mirant Corp., 378 F.3d 511 (5th Cir. 2004).

Co.) 208 F. 3d 498, 504 (5th Cir. 2000); *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture),* 995 F.2d 1274, 1281 (5th Cir. 1991).

Moreover, Debtors are correct in their assertion that, absent a contract's assumption, a debtor's counterparty to that contract is entitled to payment only to the extent the debtor's post-petition estate received benefit from the contract. See Code § 503(b); *Data-Link Sys., Inc. v. Whitcomb & Keller Mortgage Co., Inc. (In re Whitcomb & Keller Mortgage Co., Inc.*), 715 F.2d 375, 379 (7th Cir. 1983); *In re Kmart Corp.,* 293 B.R. 905, 909-10 (Bankr. N.D. Ill. 2003). It is thus certainly *possible* that Debtors may never be required to pay (or ever treat under a plan) unpaid amounts due Pepco post-petition under the Back-to-Back Agreement.

It is against this legal background that the court must view the Motion. Moreover, since the Motion seeks affirmative (as opposed to preventive) relief, the injunction Pepco requests is, as Pepco agreed at the December 15 hearing, mandatory in nature. That means Pepco must make a much stronger showing than if it sought only to prevent an act by Debtors. *Stanley v. University of Southern California*, 13 F. 3d 1313, 1320 (9th Cir. 1994); *Anderson v. United States*, 612 F. 2d 1112, 1114-15 (9th Cir. 1979); *Martinez v. Mathews*, 544 F. 2d 1233, 1243 (5th Cir. 1976).

In other words, Pepco must prove up all four elements required for injunctive relief and must do so in a most convincing manner. Those four elements are (1) probability of movant's success on the merits; (2) likelihood of irreparable harm to movant; (3) movant is favored in the balancing of the equities; and (4) relief is consistent with the public interest. *See* 13 MOORE'S FEDERAL PRACTICE § 65.22 (3rd ed. 1997).

Given the decision of the District Court, there is no question but that the fourth element is met. This court is, of course, bound by the District Court's decision, and that decision

clearly implies that non-performance by Debtors under the Back-to-Back Agreement would be against the public interest. *See In re Mirant Corp.*, Slip Op., p. 11. Similarly, the balance of the equities favors Pepco. As Rigby testified, Pepco's credit rating could be adversely affected by Debtors' failure to make payments under the Back-to-Back Agreement. Debtors will only lose possession of cash – and Debtors have ample cash to pay Pepco without interfering with Debtors' business.

During the December 15 hearing, the court also assumed Pepco had shown it was likely to prevail on the merits. The court's assumption was based on the fact that Pepco could show Debtors had breached the Back-to-Back Agreement and so were entitled to a remedy. The court did not intend to suggest what that remedy might be or that Debtors, under every possible scenario, must ultimately perform the Back-to-Back Agreement.

However, the court was not required to analyze fully the various permutations of Pepco's "success" and whether, in fact, the first test for injunctive relief had been met. This is so because Pepco simply did not show "irreparable harm."

As a general rule, equitable remedies such as a mandatory injunction are not available to obtain money damages. *See, e.g., Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). As Rigby testified, Pepco's direct damage as a result of Debtors' breach of the Back-to-Back Agreement equals the amounts not paid (a total of approximately $20,000,000 per month.) The indirect consequence of Debtors' breach would be a credit downgrade. Rigby testified that the cost to Pepco of dealing with such a credit downgrade would likely be less than $10,000,000 per year.[4] Given Pepco's current assets of $1,801,600,000 and balance sheet equity of $3,428,500,000 it does not appear Pepco will be

[4] Pepco urged that the court consider the potential harm of the credit downgrade to its shareholders. Assuming, arguendo, that the argument was properly before the court, harm to Pepco's owners is too remote and its relevance in a bankruptcy context too tenuous to support the relief sought in the Motion.

unable to handle these financial burdens. Thus, the court finds no harm which requires extraordinary relief at this time.

Pepco also argued that Debtors' decision to breach the Back-to-Back Agreement was foolish and contrary to creditor interests. Leaving aside that "irreparable harm" refers to harm to the party seeking relief, the court finds Pepco's argument unpersuasive. As a general rule, the court should leave business decisions to a debtor in possession. This would include the decision whether to perform or breach a contract. While the court may have the power to direct a debtor in possession in the performance of its duties, that power should be exercised with restraint – and certainly not used as the basis for granting extraordinary, emergency relief such as that requested in the Motion.

Here three official committees, one unofficial committee, an examiner and the United States Trustee are monitoring Debtors' operations. Not one of these, however, has argued in support of the Motion or suggested Debtors have acted foolishly or contrary to creditor interests in deciding to cease payment under the Back-to-Back Agreement. Though the court expressed some doubt about the Debtors' past conduct on the record on December 15, Debtors' conduct of these cases has been generally satisfactory and consistent with their fiduciary duties, and the court has no basis at this writing to exercise control over Debtors' conduct generally or in connection with the Back-to-Back Agreement.

Outside of chapter 11, a company's managers may elect to stop performing monetary obligations a under contract. The reasons for doing so may vary – and may include an effort to find leverage in a related dispute. A counter-party in such a situation would not be entitled to a mandatory injunction to enforce performance. That Debtors are operating under the protection

of the bankruptcy court should not change the result in a dispute over such non-performance. The context in which the Motion was brought does not enhance Pepco's rights or remedies.

For the foregoing reasons, the Motion is DENIED.

It is so ORDERED.

Signed this the ____ day of December 2004.

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Hon. Dennis Michael Lynn,
United States Bankruptcy Court